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No. (1)

In the Supreme Court of the United States

JACK DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a trial court should be compelled to *sua sponte* reconsider its previous denial of a motion to suppress when the testimony upon which it relied for that ruling was materially altered during trial.

2. Whether plain error was committed when a trial court improperly bolstered the credibility of a government witness in response to a note from a jury and when two kilograms of cocaine were admitted against a defendant in the absence of an evidentiary connection.

3. Whether the judgment of a court of appeals should be reversed where it failed to properly apply this Court's precedent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jack Davis, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the court of appeals (App 1A – 6A, *infra*) is available at 2007 WL 1549034 (C.A.D.C. May 9, 2007). The pertinent opinion of the district court may be found at 402 F.Supp.2d 252 (D.D.C. 2005) and is reprinted, in relevant part, in the Appendix, 7A-16A, *infra*. An order of the district court, as well as portions of the pre-trial and trial transcripts, and jury notes are reprinted, in relevant part, in the Appendix, 17A-31A, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2007. The petitioner, Jack Davis, filed timely motions for rehearing and rehearing en banc. On August 3, 2007, those motions were denied. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Criminal Procedure 52(b) provides:

> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention

Federal Rule of Evidence 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rule prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Federal Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 404(b) provides:

> Other Crimes, Wrongs, or Acts -- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show

> action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

STATEMENT

The Safe Streets Task Force, a joint venture between the Federal Bureau of Investigation and the Metropolitan Police Department, has conducted extensive investigations into drug activities in the Washington, DC metropolitan area. Relying upon information provided by that Task Force, the government filed a case against the petitioner, Jack Davis, in the United States District Court for the District of Columbia charging him with various federal offenses.[1] An initial indictment, charging petitioner and three co-defendants, including his twin brother, James, was filed on August 12, 2003. Several superseding indictments

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[1] *United States of America v. Jack Davis*, 1:03-cr-00348-RWR-1. Mr. Davis was charged by indictment with violations of 21 U.S.C. 846, 21 U.S.C. 844(a), 21 U.S.C. 841(a)(1) and (b)(1)(C), 18 U.S.C. 924(c)(1), 18 U.S.C. 922(k), and 18 U.S.C. 924(a)(1)(B).

followed; with the last being filed shortly before petitioner's trial and solely charging him. In each of the indictments, the petitioner was charged with a narcotics conspiracy and other drug and firearm offenses.

Two of petitioner's alleged co-conspirators, Cedric Conner and Paul Tyler, pled guilty at various stages of the cases against them. The petitioner's identical twin brother, James, stood trial in a separate proceeding from petitioner and was acquitted of all charges.

Petitioner moved for pre-trial relief, including a motion to suppress physical evidence seized by members of the Safe Streets Task Force, Special Agents Robert Lockhart and Kyle Fulmer, during a stop of petitioner's vehicle on December 17, 2001. On March 18, 2004, a motions hearing on that motion to suppress, as well as several other motions filed by petitioner and his remaining co-defendants, was held in the district court.

The government's evidence during the suppression hearing consisted solely of the testimony of Special Agent Kyle Fulmer. According to Agent Fulmer's testimony during that hearing, he and Special Agent Lockhart were surveilling petitioner through the streets of Southeast Washington, DC on December 17, 2001. Agent Fulmer was driving their vehicle as they followed petitioner to a shopping center. At that center, Agent Lockhart exited the vehicle, entered a market and witnessed petitioner

purchasing a container of orange juice. Agent Lockhart then returned to the vehicle and Agent Fulmer drove them to a surveillance post just outside the shopping center's parking area.

At the suppression hearing, Agent Fulmer further testified that he and Agent Lockhart began to once again follow petitioner after they observed him drive his vehicle out of the shopping center. Eventually, they followed petitioner as he traveled southbound on Wayne Place SE. Agent Fulmer testified that at approximately 1:30 p.m. that afternoon, petitioner "rolled through" a stop sign and began to turn right at the intersection of Wayne Place and Second Street, SE.[2] The agents had already decided to break off surveillance, and planned to continue "straight" through the intersection. Agent Fulmer testified that once the agents' vehicle proceeded into the intersection, petitioner initiated a U-turn, and the two vehicles nearly collided in the intersection. At that point, Agent Fulmer activated his vehicle's siren and emergency lights to initiate a traffic stop.

Agent Fulmer further testified at the suppression hearing that upon approaching the passenger side of petitioner's vehicle, he saw marijuana located inside in plain view. As a result,

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[2] Three roads come together at the intersection in question: Wayne Place, SE doglegs at the intersection from a southwest direction to a northwest direction; Second Street SE begins at the intersection, to the right of Wayne Place SE; and Xenia Street SE begins at the intersection, to the left of Wayne Place, SE.

petitioner was arrested. In addition to the marijuana, a search of petitioner's vehicle incident to that arrest revealed a firearm, several vials each containing very small amounts of liquid later identified as phencyclidine, boxes of empty vials and caps, and numerous personal effects.

Petitioner's evidence at the suppression hearing included the testimony of an eyewitness to the stop, James Buckhanan. Mr. Buckhanan testified that he was to meet petitioner on Wayne Place SE to play cards at the home of petitioner's friend. Mr. Buckhanan was parked on Wayne Place SE when petitioner's vehicle passed, with the agents' vehicle following behind. Mr. Buckhanan alighted from his vehicle and observed petitioner come to a full stop at the stop sign located at the intersection of Wayne Place, Second Street and Xenia Street SE. According to Mr. Buckhanan, when petitioner's vehicle began to execute a U-turn, the agents' vehicle rushed to cut off peitioner's vehicle. Mr. Buckhanan remained in the area just long enough to witness the agents' taking petitioner out of his vehicle.

At the conclusion of the suppression hearing, the district court credited the testimony of Agent Fulmer that petitioner's vehicle failed to come to a full stop and rolled through the stop sign at the intersection of Wayne Place, Second Street and Xenia Street SE. Having found that there was a violation of the requirement that a vehicle come to a full stop at a stop sign, the district court found that

the agents did have a proper basis for stopping petitioner. As the agents had a lawful basis for stopping petitioner, the district court found that they had a proper basis for approaching his vehicle and for arresting him when Agent Fulmer observed marijuana in plain view. The court further found that the search of petitioner's vehicle was proper incident to his arrest, and denied petitioner's motion to suppress the physical evidence seized during that search.

Shortly before trial, the government advised petitioner's trial counsel that it would be seeking a superseding indictment, wherein it would include evidence that petitioner committed murder in furtherance of the goals of the charged narcotics conspiracy. Petitioner had previously stood trial for a murder, and had been acquitted.

Based upon the government's representations, petitioner filed a motion *in limine* on August 10, 2004 to preclude admission of evidence related to the murder of which he had been acquitted. Petitioner argued that such evidence was not "intertwined" with the charged conduct. The government opposed that motion, arguing that the murder was direct evidence of the charged conduct. The district court denied petitioner's motion *in limine*.

On August 31, 2004, the government filed its last superseding indictment against petitioner, alleging murder as part of the ways, manner and means of the charged narcotics conspiracy. On

October 6, 2004, petitioner's jury received its initial instructions and his trial began.

At petitioner's trial, the government presented approximately twenty-two witnesses, including Special Agent Kyle Fulmer. During cross- and re-direct examination, Agent Fulmer once again testified regarding the stop of petitioner's vehicle on December 17, 2001. When petitioner's trial counsel first inquired about that stop during cross-examination, Agent Fulmer testified that the agents' vehicle was "very close" behind petitioner's vehicle (explaining that it was only "a few hundred feet behind him") and that when petitioner "came to a stop at Second and Wayne Place", the agents pulled up behind him. Agent Fulmer further explained that petitioner was "stopped at the sign for a little bit" before he began to execute a U-turn. Petitioner's trial counsel asked for confirmation that petitioner had stopped his vehicle at the stop sign, and Agent Fulmer answered affirmatively.

Petitioner's trial counsel then inquired as to whether Special Agent Fulmer recalled his testimony during the motions hearing on March 18, 2004, wherein he testified that petitioner did not come to a full stop at that stop sign. Agent Fulmer responded, "I am just saying he stopped at the stop sign." Under further questioning by petitioner's trial counsel, Agent Fulmer testified that "he [petitioner] slowed and basically stopped," adding that petitioner had "rolled through the stop sign," much like he himself often does, and offered that he refers to that as a "stop."

During re-direct examination by the government, Agent Fulmer further testified that he and his partner initiated the traffic stop on the petitioner as a result of the U-turn, and whether petitioner had or hadn't stopped at the stop sign was not a factor in the traffic stop.

In addition to Special Agent Fulmer's testimony regarding the December 17, 2001 traffic stop of petitioner, the government presented evidence that petitioner had committed murder to petitioner's jury. Three witnesses testified, pursuant to cooperation agreements with the government, that petitioner admitted murdering an individual who had robbed his twin brother, James. Two of those three cooperating witnesses further testified that petitioner had told them that he was acquitted of that murder.

The government also presented evidence, through current and former members of the Prince George's County, Maryland Police Department, of the interdiction of two kilograms of powder cocaine on June 27, 2001. According to that testimony, one of the officers received a telephone call on June 26, 2001 from the Los Angeles, California Sheriff's Department alerting him to a suspicious package being shipped via Federal Express. On the morning of June 27, 2001, the Interdiction Unit of the Prince George's County Police Department was examining packages at a Federal Express location. Upon identifying the package about which they previously had been alerted, a member of the Interdiction Unit

removed it from the conveyor belt and presented it for canine inspection. Based upon the results of that inspection, a Federal Express employee opened the package and discovered two kilograms of cocaine.

The Interdiction Unit took possession of the package, including the cocaine, and repackaged it to attempt a controlled delivery to the addressee. In addition, a member of the Unit prepared an application for a search warrant to be authorized by a Prince George's County judge and executed in the event that the controlled delivery was successful.

As a member of the Unit waited in the chambers of a Prince George's County judge, another member of the Unit (dressed in a Federal Express uniform) attempted to deliver the package to its addressee, "Michael Ritter Cycles" at 8530 Edgeworth Drive in Capitol Heights, Maryland. According to the officers' testimony, a caucasian woman answered the door at the location, an insurance business, and refused the delivery. As the delivery was refused, the Interdiction Unit closed its investigation and marked the cocaine for destruction by their drug lab.

Rather than destroying the cocaine in question, the drug lab provided it as a training tool to the Interdiction Unit's narcotic-detecting canine training program. After approximately one year of use as such a training tool, the cocaine was returned to the drug lab. Some time thereafter, those same two kilograms of cocaine were provided to Special Agent Lockhart of the Safe Streets Task Force after it

was somehow determined that they were related to its investigation into petitioner.

The government also presented the testimony of Michelle Beasley, a friend of petitioner's, regarding those two kilograms of cocaine. Ms. Beasley testified that she and petitioner were friends and were, for a short time, involved in a romantic relationship. She further testified that, a few months prior to June of 2001, petitioner had telephoned her and asked if she would sign for a Federal Express package for him at her place of business. She agreed, and the following morning she signed for a package, approximately the size of a shoebox. Petitioner telephoned her several hours after the delivery. She confirmed delivery of the package, and he retrieved it later that day. Ms. Beasley stated that she did not look to see from which state that package had been shipped, and testified that she had not touched that package.

Ms. Beasley further testified that in June of 2001, Federal Express attempted to deliver a package to her office addressed to the previous occupant of the space, Ritler Cycles. She refused delivery of that package. Ms. Beasley explained that she was still receiving mail and packages for Ritler Cycles, many of them from Las Vegas and California. She testified that she would either refuse delivery of such, or would mark them "return to sender". According to Ms. Beasley, the frequency of mail addressed to Ritler Cycles remained constant during her tenancy from sometime in 1999 through December 2001.

Finally, Ms. Beasley testified that she saw petitioner park his car and go into the "rim shop" next to her insurance business, "All Things Automotive", before the attempted delivery of the package addressed to Ritler Cycles in June of 2001. She also testified that petitioner had never requested that she sign for more than the one package, and that she and petitioner never had any conversation about the delivery she refused in June of 2001.

In addition to the evidence presented through Ms. Beasley and the law enforcement officers, the government presented evidence regarding the two kilograms of cocaine through two cooperating witnesses. One of those witnesses, Michael Henderson, testified that petitioner had told him that he was having cocaine shipped to a "white girl" who was an insurance agent, and, when he was driving to pick it up, he saw cars with tinted windows. According to Mr. Henderson, petitioner became suspicious and decided not to go pick up the package. Mr. Henderson also testified that petitioner stated that he had successfully shipped cocaine to that location before.

The other cooperating witness, Keith Harrison, testified that, during a conversation in which he was reminiscing, petitioner told him that he was getting cocaine from a source in California and was having shipped via Federal Express. He also stated that petitioner told him that he had lost a shipment of cocaine when it was shipped to "his

girlfriend, or somebody's girl" and it was intercepted by the police.[3]

Petitioner presented evidence that his sister, Monica Davis, was engaged in 2001 to Keith Thompson, the owner of the "rim shop," known as "All Things Automotive," located next to Ms. Beasley's place of business. Mr. Thompson testified that petitioner was at his "rim shop" quite often, and that he and petitioner were "like family". In addition, he testified that he had used petitioner's vehicle as a "rolling display" to advertise his shop by placing distinctive "rims" on it.[4] Mr. Thompson stated that petitioner was provided the "rims" without cost, with the understanding that should another customer wish to purchase that particular set of "rims", petitioner's "rims" would be replaced with a new set. According to Mr. Thompson, he replaced the "rims" on petitioner's vehicles at least two or three times.

Petitioner also presented evidence that the Safe Streets Task Force seized his vehicle on December 17, 2001, and that the vehicle was never returned to him because it was later repossessed. Upon learning that he would be unable to recover the "rims" placed on petitioner's vehicle as an

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[3] Another witness testified that petitioner told him about a shipment of cocaine from California that Cedric Conner "lost" when it was interdicted at his former girlfriend, Sheila Teasley's, house.

[4] Mr. Thompson testified that the rims on petitioner's vehicle cost him approximately $7500.00.

advertisement, Mr. Thompson testified that he requested payment for such from petitioner. As petitioner was unable to make that payment, his sister, Monica Davis, paid Mr. Thompson.[5]

After receiving final instructions, petitioner's jury began its deliberations. Within approximately one hour, the jury sent out its very first substantive note.[6] In it, the jury asked whether it needed to determine whether "it was a legal stop on December 17, 2001, or has it already been reviewed by the court and determined it was legal." Over objection, the district court responded that it did not need to determine whether "it was a legal stop on December 17, 2001. That has already been reviewed and determined by the Court."

The next day, petitioner's jury sent out another pertinent note. It asked whether it "must conclude that the 'ways, manner and means to accomplish conspiracy must be exactly as described in the indictment. Specifically, must the jury conclude beyond a reasonable doubt that it was part of the conspiracy that co-conspirators 'knowingly and intentionally perpetrated acts of violence, including

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[5] Petitioner presented copies of three checks dated March 8, 2002, April 27, 2002 and August 19, 2002 and made payable to "All Things Automotive" totaling $8035. In the memo section of the checks, Ms. Davis had written "Down P", which, according to Mr. Thompson, was the name of the "rims" placed on petitioner's vehicle.

[6] The very first note sent out by petitioner's jury merely requested additional copies of certain documents.

murder." Petitioner's trial counsel requested that the answer provided to the jury include re-instruction regarding the essential elements of the conspiracy. The district court rejected that request, and provided the following answer: "Dear Jurors: The answer to both questions is 'no.'

After several additional notes, the jury returned its verdicts on November 1, 2004. It found petitioner guilty of five of the six counts with which he was charged. It found petitioner not guilty of the remaining count, possession of a firearm with an obliterated serial number.

Petitioner timely filed motions for a judgment of acquittal after jury trial and for a new trial on November 12, 2004. Petitioner argued that he was entitled to a post-conviction judgment of acquittal on three grounds: because the evidence was insufficient to sustain his conviction on the conspiracy charge; because the district court should reverse its denial of his motion to suppress due to the inconsistencies in Agent Fulmer's motions hearing testimony and trial testimony; and because the district court should reverse its improper denial of his motion *in limine* regarding acquitted conduct. In addition, petitioner argued that he was entitled to a new trial due to the government's violation of the Jencks Act.

The government filed a response to petitioner's post-trial motions, petitioner filed a reply, as well as supplemental memoranda, and the government filed an amended response. On September 15, 2005, more than ten months after his

post-trial motions were originally filed, petitioner requested that the district court rule on his outstanding motions. On November 23, 2005, the district court denied petitioner's motions, contemporaneously issuing a memorandum opinion.

With regard to petitioner's argument that the district court should reverse its denial of his motion to suppress and grant him a post-conviction judgment of acquittal on several counts, the district court opined that petitioner's argument would more properly be the basis of either a motion for reconsideration or for new trial. In denying petitioner's request regarding his motion to suppress, the district court found that Agent Fulmer's testimony at trial was not significantly inconsistent with his testimony at the suppression hearing. The district court supported its decision by stating that Agent Fulmer had never testified at either the trial or the suppression hearing that petitioner had come to a "complete stop" at the stop sign.

With regard to petitioner's argument that the district court should reverse its denial of his motion *in limine* and grant him a post-conviction judgment of acquittal, the district court noted that although it was unclear from his post-trial briefs, it appeared he was arguing that "no evidence indicates that the alleged conspiracy and the murder were related." Finding that the evidence regarding the murder was intrinsic evidence of the charged conspiracy, the district court denied petitioner's request regarding his motion *in limine*.

On March 2, 2006, petitioner was sentenced to concurrent sentences on four of the five counts of which he was convicted, the longest of which was two hundred and fifty months. In addition, petitioner was sentenced to a sentence of sixty months for the firearm offense, to be served consecutive to his other sentences.

Petitioner filed a timely notice of appeal with the United States Court of Appeals for the District of Columbia.[7] In his opening brief, petitioner raised seven issues, including: (I) that "the district court erred in denying appellant's pretrial motion to suppress, and in denying appellant's motion for new trial/acquittal when it refused to reconsider its pretrial denial of appellant's motion to suppress;" (II) that "the district court erred in first denying appellant's motion *in limine*, and subsequently his motion for acquittal and new trial, when the court permitted evidence of appellant's prior acquitted conduct to be submitted to the jurors by the government as part of their case in chief; and (V) that "the district court erred in admitting evidence at trial of two kilograms of cocaine never linked to appellant, when such evidence was irrelevant."

In his statement of facts, petitioner discussed the discrepancy between Agent Fulmer's suppression hearing testimony and his trial testimony regarding whether petitioner had come to a full stop at the stop sign on December 17, 2001. The only mention of that discrepancy in the argument section of that

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[7] *United States of America v. Jack Davis*, No. 06-3046.

brief, however, was footnote number three: "The testimony of Agent Fulmer at trial established appellant did make a full stop at the subject stop sign."

In its brief, the government noted that petitioner had erroneously argued that the basis of the district court's denial of the motion to suppress was premised on a finding that he made an illegal U-turn. In a footnote, the government argued that because petitioner had failed to challenge the district court's actual ruling in his opening brief, he could not do so in his reply.

In its judgment stamped May 9, 2007, the court of appeals found that petitioner had not challenged the district court's finding that he failed to stop at the stop sign until his reply brief, and, therefore, he had waived that argument. The court of appeals, however, indicated that even had petitioner properly raised that argument, it would not have found error, given the district court's opportunity to evaluate witness credibility.

The court of appeals further held that the district court had not abused its discretion by admitting the evidence of petitioner's acquitted conduct as intrinsic to the conspiracy charged. The court of appeals based this holding on the manner in which the indictment charged the conspiracy and circumstantial evidence that the murder was connected to the conspiracy.

Finally, the court of appeals noted that petitioner had failed to object to the admission of the two kilograms of cocaine that were the subject of the attempted controlled delivery to Ms. Beasley at trial. It held, in pertinent part, that the district court had committed no error in admitting the two kilograms of cocaine that were the subject of the attempted controlled delivery, much less plain error. The court of appeals based that holding on the circumstantial evidence linking petitioner to the package – "namely his relationship with the woman to whom the package was addressed, etc."

Petitioner filed timely motions for rehearing and for rehearing en banc. Those motions were denied on August 3, 2007, and he is petitioning this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

REASONS FOR GRANTING THE PETITION

I. Because A Successful Prosecution Was Dependent Upon The Admission Of Seized Evidence, The District Court's Failure To, *Sua Sponte*, Reconsider Its Admission When Testimony Upon Which It Had Relied Was Materially Altered Constituted Reversible Error.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Petitioner filed a motion to suppress the evidence seized during his December 17, 2001 traffic stop, alleging that Agents Fulmer and Lockhart lacked a legal basis for that stop and, therefore his Fourth Amendment right to be free from unreasonable search and seizure had been violated. During the suppression hearing, Agent Fulmer testified that petitioner "rolled through" a stop sign and executed an illegal U-turn. App, *infra*, 22A-23A. Crediting the agent's testimony, the district court denied petitioner's suppression motion, finding that petitioner violated the legal requirement to come to a full stop at a stop sign, which gave the agents a proper basis to approach his vehicle, arrest him upon seeing marijuana in plain view and seize several items of contraband. App, *infra*, 19A.

At trial, Agent Fulmer testified that he and Agent Lockhart were "a few hundred feet behind" petitioner and came up behind him while he was stopped at a stop sign. App, *infra*, 25A. Thereafter, Agent Fulmer was once again asked if petitioner had stopped his vehicle, and he responded affirmatively. App, *infra*, 26A.

Seeking to presumably impeach the agent, petitioner's trial counsel asked if he recalled his testimony at the suppression hearing wherein he testified that petitioner had not come to a full stop at the stop sign. *Id.* The agent responded, "I'm just saying he stopped at the stop sign." *Id.*

A further reading of the transcript reveals that, apparently realizing what petitioner's trial counsel was attempting to do, Agent Fulmer began to back-peddle. When asked if his trial testimony was that petitioner had come to a complete stop, Agent Fulmer replied that he "slowed and basically stopped," and, under continued questioning, offered that petitioner had rolled through the stop sign, as the agent often did himself. App, *infra*, 27A-28A.

Taking Agent Fulmer's initial statement at face value, and assuming that his vehicle was proceeding at a constant rate of speed of approximately thirty-five miles per hour, it would have taken approximately 3.9 seconds to reach petitioner's vehicle at that stop sign.[8] Obviously, Agent Fulmer's vehicle would not have traveled at a constant rate of speed, as he would have decelerated upon approaching the stop sign. Therefore, at least four seconds must have elapsed before he reached petitioner's vehicle at that stop sign. Clearly, a vehicle that was stopped for approximately four

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[8] For the purposes of this illustration, it was assumed that Agent Fulmer's vehicle was traveling two hundred feet behind petitioner's vehicle. The formula employed was (3600/number of seconds) x (number of feet/5280) = miles per hour.

seconds had come to a full and complete stop at the stop sign. Therefore, a violation of that requirement could not serve as the legal basis for a traffic stop. Upon hearing that testimony, the district court should have *sua sponte* reconsidered and reversed its previous denial of petitioner's motion to suppress.

A. The United States Court of Appeals for the District of Columbia improperly treated petitioner's issue as waived.

In its judgment, the court of appeals held that petitioner had failed to challenge the district court's suppression ruling. App, *infra*, 1A. That holding is unsupported by the evidence and current precedent.

In his opening brief before the court of appeals, petitioner presented seven issues, among them whether the district court had erred in denying petitioner's pretrial motion to suppress and post-trial motions when it failed to reconsider its pretrial denial of that motion to suppress. In his Statement of Facts, petitioner clearly presented the difference between Agent Fulmer's suppression hearing testimony and trial testimony. Although the majority of the argument presented pertaining to that issue centered around whether petitioner had made an "illegal" U-turn, a footnote in that argument reveals the basis for such: Agent Fulmer's trial testimony clearly established that petitioner had come to a full stop at the stop sign. App, *infra*, 25A-29A.

In a footnote in its brief in opposition, the government alleged that petitioner had waived any challenge to the district court's ruling on the suppression motion because he had not presented argument regarding the true basis of the district court's denial of the motion to suppress. In its judgment, the court of appeals agreed with the government, citing, *PDK Labs, Inc. v. DEA*, 438 F.3d 1184, 1196 (D.C. Cir. 2006). App, *infra*, 1A.

It is well settled in the D.C. Circuit that *issues* may not be raised for the first time in an appellant's reply brief. *See McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208, 1210-11 (D.C. Cir. 1986); *Asociacion de Compositores v. Copyright Royalty Tribunal*, 809 F.2d 926, 928 (D.C. Cir. 1987); *Rollins Environmental Services (NJ), Inc. v. EPA*, 937 F.2d 649, 653 n.2 (D.C. Cir. 1991); *City of Nephi, Utah v. FERC*, 147 F.3d 929, 933 n.9 (D.C. Cir. 1998); *Bd. of Regents of the Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996).

Petitioner, however, had clearly raised the issue of whether the district court had erred in refusing to reconsider its previous suppression ruling in his initial brief before the court of appeals. Although it is true that petitioner focused his argument on whether or not the U-turn he executed was legal, he did note that Agent Fulmer's trial testimony established that he had come to a full stop at the stop sign. Presumably, petitioner was, therefore, confident that a traffic violation regarding the stop sign could not be argued, and, therefore, could not serve as the legal basis for the traffic stop.

In order to address the issue he believed was in contention, petitioner devoted his argument to the legality of the U-turn.

As Petitioner did preserve the suppression issue in his opening brief, it was preserved for consideration and not waived. *Cf. New York Rehabilitation Care Mgt., LLC v. NLRB*, 2007 WL 3145494 (D.C. Cir. October 30, 2007); *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005).

Even were this Court to agree with the court of appeals, however, that petitioner had waived his stop sign challenge to the district court's suppression ruling, the failure of the district court to *sua sponte* reconsider that ruling in the face of Agent Fulmer's trial testimony constituted plain error.[9] As it affected the fairness and integrity of petitioner's trial, it should have been considered by the court of appeals. *United States v. Frady*, 456 U.S. 152, 163 (1982); *United States v. Atkinson*, 297 U.S. 157, 160 (1926); *United States v. Copelin*, 996 F.2d 379, 383 (D.C. Cir. 1993).

A successful prosecution of petitioner with regard to several counts in the indictment was dependent upon the admission of evidence seized during the traffic stop.[10] Had that seized evidence

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[9] Pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure, "a plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

[10] Counts II, III, and IV all charged petitioner with crimes arising out of the events of December 17, 2001.

been suppressed, conviction would have been impossible. As a result, the petitioner's substantial right to a fair trial was affected by the district court's failure to reconsider its ruling, and the court of appeals should have considered the issue in more than a cursory manner.[11]

II. Because The District Court Committed Plain Error In Response To A Note From The Jury And In Admitting Evidence.

A. The district court committed plain error when it improperly bolstered the testimony of a government witness in response to a note from the jury.

It is well settled that the credibility of trial witnesses is the sole and exclusive province of the trier of fact. In a jury trial, that determination is left to the jury. *United States v. Washington*, 106 F.3d 983, 1002 (D.C. Cir. 1997), *cert denied*, 522 U.S. 984 (1997) (stating that "it is the jury's province to determine credibility and weigh evidence"); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (stating that it is the jury's responsibility to resolve conflicts in testimony); *United States v. Goode*, 814 F.2d 1353, 1355 (9th Cir. 1987) (stating that jury's exclusive province to determine witness credibility); *United*

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[11] Although the court of appeals did theoretically discuss how it would have held had the issue been properly raised, it did so without a full briefing and relying upon the factual misunderstanding of the district court. Therefore, such discussion is unpersuasive.

States v. Bower, 484 F.3d 1021, 1025 (8th Cir. 2007) (credibility issues should be left to the jury). The trial court should play no part in the jury's determination of credibility. *See United States v. Smith*, 680 F.2d 255, 260 (1st Cir. 1982), *cert denied*, 459 U.S. 1110 (1983).

Immediately following final instructions, petitioner's jury began its deliberations. Within a very short period of time, it sent out the following note:

> Do we need to determine wether [sic] it was a legal stop on December 17, 2001, or has it already been reviewed by the court and determine [sic] it was legal.

App, *infra*, 30A.

After receiving the note, the district court and the parties participated in a long discussion. Petitioner's trial counsel was very clear that the answer to the jury should simply be, "no." Government counsel argued that the language of the answer should mirror the language of the note. The court entertained informing the jury that it had already determined that the stop was "legal", but stopped short of doing so, responding instead:

> Dear Jurors,
>
> Thank you for your note.

> You do not need to determine whether it was a legal stop on December 17, 2001. That has already been reviewed and determined by the court.

Id.

As was set forth above, petitioner's trial counsel went to great lengths to impeach the trial testimony of Agent Fulmer, using his motions hearing testimony. App, *infra*, 25A-29A. Based upon its note and the timing thereof, that effort was not lost on petitioner's jury. By responding in the manner it did, the district court improperly bolstered the credibility of a government witness, Agent Fulmer, by informing the jury that it had determined which version of the agent's testimony it believed and the evidence seized during that stop was properly before them for consideration. In doing so, the district court imprinted its opinion upon the jury and improperly entered the jury's deliberations.

As the district court improperly bolstered the credibility of a government witness on an issue of central importance to petitioner's trial, it committed error. That error affected petitioner's substantial right to have his jury independently weigh the credibility of the witnesses against him. As a result, that error must be characterized as plain error, and, pursuant to Fed.R.Crim.P. 52(b), *supra*, may be considered by this Court.

B. The district court committed plain error when it admitted evidence of two kilograms of cocaine.

Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Admission of narcotics evidence without an evidentiary connection made to a defendant is error *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973). In addition, for narcotics evidence to be properly admitted in a conspiracy case, it must be linked to the conspiracy charged. *United States v. Tarantino*, 846 F.2d 1384, 1409 (D.C. Cir. 1988), *cert denied*, 488 U.S. 867 (1988). Circumstantial evidence is sufficient to link a defendant to physical evidence. *See United Stats v. Soto*, 591 F.2d 1091 (5th Cir. 1979).

As set forth above, Fed.R.Crim.P. 52(b) provides for appellate review of plain error. Review for plain error is appropriate where a defendant fails to object to the admission of evidence at trial. *United States v. Spriggs*, 102 F.3d 1245, 1257 (D.C. Cir. 1996).

At trial, the government presented testimony through several law enforcement witnesses, two cooperating witness and Ms. Michelle Beasley regarding two kilograms of cocaine interdicted at a Federal Express location in June of 2001. The government's theory was that petitioner had shipped, or caused to be shipped, those two kilograms of cocaine, and, therefore, they were part and parcel of the charged conspiracy. Petitioner's trial counsel failed to object to the admission of the two kilograms at trial.

The evidence at trial regarding the two kilograms is set forth at length above. To summarize, the government's theory was that the cocaine was linked to petitioner because he had obtained cocaine from California in the past, had a previous relationship with Ms. Beasley, and had had a package shipped to Ms. Beasley a few months prior.

Contrary to the government's assertion, the two kilograms of cocaine were not linked to petitioner. In the alternative, even were petitioner's jury to properly conclude that they were linked to him, the government did not present one scintilla of evidence that they were linked to the charged conspiracy.

Although the evidence presented by the government at trial alleged petitioner had a California connection for cocaine, which he shipped to the metropolitan Washington, DC area, it failed to establish a single connection between the interdicted

narcotics and petitioner. There was not a shred of testimony that petitioner had been to California in June of 2001, or had obtained a large quantity of cocaine from California, which was shipped to the Washington area, at that time. Although the court of appeals stated in its judgment that the interdicted Federal Express package was addressed to Ms. Beasley (App, *infra*, 4A-5A), it was not. In fact, that package was addressed to the previous occupant of her space, Ritler Cycles, for whom Ms. Beasley continued to receive mail and packages.

In addition, there was not a single piece of credible, direct evidence admitted which showed that the package petitioner had previously shipped to Ms. Beasley's location contained cocaine.[12] Ms. Beasley had never touched the package, and she and the petitioner never discussed its contents. Further, Ms. Beasley testified that petitioner had sought consent to have the first package shipped to *himself* to Ms. Beasley's business address from Ms. Beasley. The June 2001 package, by contrast, was addressed to the previous occupant of Ms. Beasley's space, Ritler Cycles. In addition, Ms. Beasley testified that she and petitioner never discussed the June 2001 package.

Even were petitioner's jury to conclude that the interdicted narcotics were destined for petitioner, there was not a scintilla of evidence which linked those narcotics with the conspiracy

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[12] The government relied upon the testimony of two cooperating witnesses to support its premise that such package was cocaine bound for petitioner.

charged. None of the cooperating witnesses that testified stated that petitioner was receiving a large quantity of cocaine in June of 2001 as part of the charged conspiracy, and the government did not offer any evidence of such.

As a result, the admission of the two kilograms of cocaine interdicted in June of 2001 against petitioner was error. That error constituted plain error because it affected the substantial right of petitioner to a fair trial, in which only evidence linked to he or the conspiracy with which he was charged was properly admitted. Pursuant to Fed.R.Crim.P. 52(b), therefore, such error is subject to review by this Court.

III. Because The Court Of Appeals Failed To Properly Apply This Court's Precedent In *Dowling v. United States* And *Ashe v. Swenson.*

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Evidence 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 404(b) provides:

Other Crimes, Wrongs, or Acts -- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the

general nature of any such evidence it intends to introduce at trial.

In *Dowling v. United States*, 493 U.S. 342 (1990), this Court held that an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court held that the Double Jeopardy Clause of the Fifth Amendment incorporates the doctrine of collateral estoppel. In order to prevail on a double jeopardy collateral estoppel motion, a defendant must establish that "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling, supra.*

Courts have held that where acquitted conduct is an intrinsic part of the crime charged, it is admissible. *United States v. Badru*, 97 F.3d 1471, 1475 (D.C. Cir. 1996); *United States v. Lukens*, 114 F.3d 1220, 1221-22 (D.C. Cir. 1997). Where such conduct is extrinsic or extraneous to the crime charged, however, is must be excluded pursuant to Fed.R.Evid. 404(b). *United States v. Allen*, 960 F.2d 1055, 1058 (D.C. Cir.), *cert denied*, 506 U.S. 881 (1992).

Petitioner filed a pretrial motion *in limine* to preclude admission of a murder, of which he was acquitted in the Superior Court of the District of Columbia, arguing that it was inadmissible pursuant to Fed.R.Evid. 404(b) as evidence of "other crimes". Subsequent to petitioner filing that motion, the

government filed a superseding indictment alleging that petitioner committed murder as part of the narcotics conspiracy. Petitioner's motion was denied by the district court, which ruled that evidence of the murder was intrinsic to the conspiracy as charged.

At trial, the government presented evidence through three cooperating witnesses that petitioner had committed a murder, of which he had been acquitted in the Superior Court of the District of Columbia. The government's theory was that petitioner killed a man after that man robbed his brother, and that such murder was committed not out of a feeling of familial solidarity, but rather to protect the interests of the charged narcotics conspiracy.

The court of appeals held that the district court did not err by admitting evidence of the acquitted conduct because it was intrinsic to the conspiracy charged, relying upon its previous holdings in *Badru* and *Lukens, supra*. App, *infra*, 2A-3A. The court of appeals, however, failed to properly apply this Court's holdings in *Dowling* and *Ashe, supra*.

Petitioner's case, unlike that of *Lukens*, comports with the requirements of *Dowling*. In *Lukens*, the court held that a general verdict regarding bribery did not reveal for certain which part of the charge the government did not adequately prove, and, therefore, evidence that the defendant conspired to accept bribes was not barred by the Double Jeopardy Clause of the Fifth

Amendment. The issue petitioner sought to foreclose, however, was actually decided by a jury in the Superior Court: he was not guilty of murder – the very same act that the government relitigated as part of the conspiracy charge. The principles of collateral estoppel, therefore, should have precluded the government from presenting evidence of that murder to petitioner's jury.

Had the court of appeals properly applied this Court's precedent in *Dowling* and *Ashe*, it would have held that petitioner's acquitted conduct was improperly admitted against him, and he was entitled to a reversal of his convictions.

In the alternative, petitioner maintains that the government never linked the acquitted conduct to the narcotics conspiracy, and, therefore, it was not intrinsic to the charge against him and should have been precluded pursuant to Fed.R.Evid. 404(b). Accepting the government's evidence at trial as true for the purposes of argument, it showed, at best, that petitioner had murdered an individual who had shot his identical twin brother. It is more probable, therefore, that such act would have been committed out of a sense of familial solidarity, rather than as part and parcel of a narcotics conspiracy. As a result, the district court erred in admitting evidence of petitioner's acquitted conduct.

CONCLUSION

For the reasons set forth above, petitioner, Jack Davis, respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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November 1, 2007

United States Court of Appeals
For the District of Columbia Circuit

No. 06-3046 **September Term, 2006**

Filed On:
United States of America, [Date Stamp
Appellee May 9, 2007]

v.

Jack Davis, a/k/a Twin,
Appellant

Appeal from the United States District Court
for the District of Columbia
(No. 03cr00348-01)

Before SENTELLE, TATEL, and BROWN, Circuit Judges.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the conviction of Appellant Jack Davis be affirmed.

Appellant challenges his conviction on several grounds, none of which has merit.

First, appellant argues that the district court erred in denying his motion to suppress evidence found in his car because FBI agents lacked reasonable suspicion to stop the car. In his opening brief, however, he argues only that his U-turn was legal; he does not challenge the district court's finding that he failed to stop at the stop sign – a traffic violation that justified the stop. *United States v. Mitchell*, 951 F.2d 1291, 1295 (D.C. Cir. 1991). Because he failed to challenge this ruling until his reply brief, appellant has waived this argument. *PDK Labs. Inc. v. DEA*, 438 F.3d 1184, 1196 (D.C. Cir. 2006) (holding that an argument raised only in fact section of opening brief and in reply brief is not properly raised). Even were the issue properly raised, given the district court's opportunity to evaluate witness credibility in the first instance, we would find no error in the court's crediting the agents' testimony that appellant failed to come to a complete stop and nearly hit their car. *See United States v. Streater*, 70 F.3d 1314, 1318 (D.C. Cir. 1995) (upholding district judge's findings of fact where officers' differing testimony posed "inconsistencies...not so glaring that the police officers' testimony must be a fabrication" (internal quotation marks and citation omitted)).

Second, appellant argues that the district court erred by admitting evidence that he had committed a murder, a charge of which he had been acquitted. The indictment charged that, as a part of the conspiracy, appellant "knowingly and intentionally perpetrated acts of violence, including murder, against individuals who disrupted, or

threatened to disrupt, the operation of the conspiracy, and in retaliation against individuals who perpetrated acts of violence against members of the conspiracy." Indictment 4-5. Given this, and given circumstantial evidence that the murder was connected to the conspiracy – namely that appellant killed someone in revenge for having robbed his brother, an alleged co-conspirator, in the same place where they dealt drugs – the district court did not abuse its discretion in admitting this evidence as intrinsic to the conspiracy charge. *United States v. Badru*, 97 F.3d 1471, 1475 (D.C.Cir. 1996) ("In cases where the incident offered is part of the conspiracy alleged in the indictment, the evidence is admissible under Rule 404(b) because it is not an 'other' crime." (internal quotation marks omitted) (quoting 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure §5239, at 450 (1978))). Nor does the admission of such evidence violate the Double Jeopardy Clause. *See United States v. Lukens*, 114 F.3d 1220, 1221-22 (D.C. Cir. 1997) (holding that even though defendant was previously acquitted of bribery charges, Double Jeopardy Clause did not prohibit government from introducing evidence of acts of bribery in furtherance of a conspiracy because defendant made no showing that "issue whose relitigation he [sought] to foreclose was actually decided in the first proceeding" (quoting *Dowling v. United States*, 492 U.S. 342, 350 (1990))).

Third, appellant argues that the government presented insufficient evidence of a single conspiracy because all of the government's witnesses who were involved in the conspiracy had no interactions with

each other outside of their relationship with him. But viewed in the light most favorable to the government, the evidence demonstrates that appellant and his brother worked together in the drug-selling scheme, which suffices to establish a single conspiracy. *See United States v. Tarantino,* 846 F.2d 1384, 1393 (D.C. Cir. 1988) (explaining that most important factor for single conspiracy is "whether the conspirators share a common goal, such as the possession and distribution of narcotics for profit"); *United States v. Lee,* 743 F.2d 1240, 1250 (8th Cir. 1984) ("The essence of a drug conspiracy is agreement by two or more persons to violate narcotics law.").

Fourth, appellant argues that, in response to a jury query as to the standard of proof for one count, the district court erred by merely affirming that the standard was reasonable doubt, rather than re-instructing the jury that all elements of all counts must be found beyond a reasonable doubt. Because the court's initial jury instructions and its response to the query were entirely accurate, we see no abuse of discretion. *See United States v. Laing,* 889 F.2d 281, 290 (D.C. Cir. 1989) (holding that court's accurate response to jury query limited to answering the query was not an abuse of discretion even though the court did not repeat its earlier, accurate, jury instructions).

Fifth, appellant argues that the district court erred in admitting a two-kilogram package of cocaine because, he claims, it was never linked to him or to the alleged conspiracy – an objection he failed to

make at trial. Given the circumstantial evidence linking him to this package – namely his relationship with the woman to whom the package was addressed, who had earlier received a package of cocaine on his behalf and who saw him in the vicinity at the time the second package was delivered – the district court committed no error in admitting the evidence, much less plain error. Fed.R.Crim.P. 52(b).

Sixth, appellant argues that the evidence was insufficient to show that the substance he possessed was crack (as opposed to other forms of cocaine) or that he had 1.5 kilograms of it, as the jury concluded. Based on detailed witness testimony about appellant's extensive dealings in large quantities of "crack", the evidence was sufficient for the jury to conclude that he dealt 1.5 kilograms of the drug.

Finally, appellant argues that the government, in violation of the Jencks Act, 18 U.S.C. §3500(b), failed to produce a statement allegedly written by one of the FBI agents about an interaction with appellant. Because the record contains no evidence that the government committed a negligent or purposive act resulting in the loss of the statement, but instead shows that the government made reasonable efforts to track down the statement and informed appellant of its status, the district court did not err in finding no Jencks Act violation. *See United States v. Perry*, 471 f.2d 1057, 1063-64 (D.C. Cir. 1972) (finding no Jencks Act violation where "there [was] no showing that the

Government has done...any act which has resulted in its inability to comply with an order of the court to produce the grand jury testimony"); *United States v. Thomas*, 97 F.3d 1499, 1502 (D.C. Cir. 1996) ("The administration of the Jencks Act is within the good sense and experience of the district judge...subject to the appropriately limited review by appellate courts." (alteration in original) (internal quotation marks and citation omitted)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed.R.App.P. 41(b); D.C.Cir.R. 41.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By: s/

Deputy Clerk

United States District Court
For the District of Columbia Circuit

United States of America,

v. Criminal Action No. 03-348 (RWR)

Jack Davis, a/k/a Twin,
Appellant

MEMORANDUM OPINION AND ORDER

On November 1, 2004, Jack Davis was convicted after a jury trial of a narcotics conspiracy, possession of marijuana, possession with intent to distribute phencyclidine ("PCP"), firearm possession during a drug trafficking offense, and unlawful distribution of cocaine.[1] Davis moved for judgment of acquittal, challenging the sufficiency of evidence and the propriety of pretrial rulings allowing the admission of certain evidence. He also moved for a

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[1] The superseding indictment on which the defendant was tried charged six offenses: conspiracy between 1993 and 2003 to possess with intent to distribute cocaine, crack cocaine, PCP, and marijuana, in violation of 21 U.S.C. § 846 (Count One); possession of marijuana, in violation of 21 U.S.C. § 844(a) (Count Two); possession with intent to distribute PCP, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Count Three); using, carrying, and possessing a firearm during a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1) (Count Four); unlawful possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k) (Count Five); and unlawful distribution of cocaine, 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Count 6). The defendant was acquitted of Count Five.

new trial alleging a violation of the Jencks Act, 18 U.S.C. § 3500 (2000), and for a court order permitting him to interview the jurors.[2]

The defendant's motion for judgment of acquittal will be denied. The evidence when viewed in the light most favorable to the government permitted a reasonable jury to find the essential elements of a conspiracy to distribute PCP, and the government was not required to establish that the charged conspiracy existed during the exact dates mentioned in the indictment. An FBI agent's trial testimony was not significantly inconsistent with his testimony at the pretrial suppression hearing or with another agent's trial testimony, and neither an order vacating the denial of the pre-trial suppression motion nor a judgment of acquittal is warranted. Moreover, the government properly introduced the defendant's acquitted conduct as evidence of conduct in furtherance of the conspiracy and not as character evidence.

* * * *

BACKGROUND

Davis was driving a Lincoln Navigator on December 17, 2001. FBI Special Agents Kyle Fulmer and Robert Lockhart stopped Davis for failing to come to a complete stop at a stop sign. (Mot. Tr. 3/18/04 at 34, 38-45.) The agents searched

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[2] Although the docket indicates that the defendant's motion was filed on November 12, 2004, a date-stamped copy of his original motion shows that it was filed on November 10, 2004, within the seven-day time period allowed under Federal Rules of Criminal Procedure 33(b)(2) and 45(a).

the Navigator and found in it marijuana, PCP, and a weapon. Before trial, Davis moved to suppress the evidence recovered during the traffic stop, alleging that the stop was illegal and that the fruits of the resulting search and seizure should be suppressed. (Mot. Tr. 3/18/04 at 166.) The court credited Fulmer's testimony that Davis' vehicle failed to come to a full stop at a stop sign, found that the agents had conducted a lawful traffic stop, and denied the defendant's motion. (Mot. Tr. 3/18/04 at 173-74.) At trial, when Fulmer was questioned about the traffic stop, Fulmer first stated that the defendant stopped his vehicle before trying to make a U-turn. When asked to clarify, Fulmer explained that he called a rolling stop a stop, even though it is not a full stop. Fulmer maintained that because the defendant came to only a rolling stop and not a full stop, the defendant had committed a traffic violation. (Trial Tr. 10/21/04 a.m. at 114-16.)

Before trial, Davis also filed a motion in limine seeking to restrict the introduction of any evidence implicating him in the murder of David Scott on the ground that Davis had been acquitted of that murder charge. (Corrected Mot. in Limine [# 180].) The conspiracy count alleged that in furtherance of the conspiracy, Davis and his co-conspirators used firearms and committed acts of violence, including murder, against anyone who disrupted or threatened to disrupt the conspiracy or in retaliation for violence committed against members of the conspiracy. The motion in limine was denied on the ground that the murder evidence

was intertwined with, and direct evidence of, the crimes being charged.

* * * *

The defendant filed an omnibus post-trial motion. He seeks a judgment of acquittal arguing that the government presented insufficient evidence to establish a conspiracy during the times alleged, and arguing that the court should reconsider and reverse its rulings denying the suppression motion and allowing the government to present evidence of the defendant's acquitted conduct.....(Def.'s Am. Omnibus Mot. for J. of Acquittal, Mot. for New Trial, Mot. for Ct. Order and Incorporated Mem. of Law in Supp. ("Def.'s Am. Mot.") at 1, 8-14.)

DISCUSSION

I. MOTION FOR JUDGMENT OF ACQUITTAL

* * * * *

B. Narcotics and gun convictions

The defendant argues that the evidence was insufficient to convict him of Counts Two through Four and Count Six alleging possession of marijuana; possession with intent to distribute PCP; using, carrying, and possessing a firearm during a drug trafficking offense; and unlawful distribution of cocaine, respectively. (*See* Def.'s Am. Mot. at 9.) Specifically, he contends that the court should reverse its prior denial of his motion to suppress, and that suppression of the evidence would warrant a judgment of acquittal on those counts. He bases his request for reversal on claimed differences between Fulmer's testimony at the suppression

hearing and his testimony at trial, and between Fulmer's and Lockhart's testimony at trial.[4] (*Id.* at 9.) The defendant cites no authority for the proposition that a post-conviction judgment of acquittal would be the proper remedy should a court reconsider the denial of a motion to suppress evidence. The defendant's argument appears to be more properly the subject of either a motion for reconsideration of the motion to suppress or of a motion for a new trial. *See United States v. Broomfield,* 201 F.3d 1270, 1273 (10th Cir.2000) (affirming the district court's order that denied defendant's motion to suppress seized evidence, and denying defendant's request for a new trial without the seized evidence); *Rouse v. United States,* 359 F.2d 1014, 1016 (D.C.Cir.1966) (remanding for fresh determination of the suppression motion and stating that a new trial would be ordered if suppression was granted). *But see United States v. Jennings,* 235 F.Supp. 551, 552-54 (D.D.C.1964) (denying the defendant's motion for judgment of acquittal based on illegally seized evidence because the court found that the Commissioner had a substantial basis for issuing a search warrant).

A pre-trial ruling on a motion to suppress does not bind the trial judge in all circumstances. *Rouse v. United States,* 359 F.2d 1014, 1015-16 (D.C.Cir.1966). When new facts shed new light on

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[4] Counts Two, Three, and Four stemmed from the traffic stop of the defendant by Fulmer and Lockhart on December 17, 2001. The defendant does not present any basis for suppressing the evidence related to the cocaine distribution on November 22, 2002 charged in Count Six.

the credibility of government witnesses and reasonable doubt is cast on the pre-trial decision, it then becomes the duty of the trial judge to reconsider the issue of suppression de novo. *Id.* at 1016. Where major inconsistencies in the police testimony surface both at the suppression hearing and at trial, the trial court should conduct a "fresh determination of the suppression issue." *Id.; see Jackson v. United States,* 353 F.2d 862, 867 (D.C.Cir.1965) (holding that where an officer's testimony is internally contradictory and is "contrary to the human experience," that officer's testimony can be discredited and the suppression decision reversed).

* * * *

Where testimonial inconsistencies are minor, however, the district court has discretion to suppress based on its "unique position to gauge [the witness's] credibility" when observing the demeanor of the witness. *United States v. Valentine,* 401 F.3d 609, 614 (5th Cir.2005). Testimony is not always suspiciously inconsistent when the differences are insignificant. *See United States v. Fryer,* 974 F.2d 813, 818 (7th Cir.1992) (finding that the officer's testimony was not significantly inconsistent when he first testified that he stopped the defendant for turning right at an intersection where that is not allowed, and later that he stopped the defendant for turning right without first stopping).

Here, Fulmer's trial testimony is not significantly inconsistent with his testimony at the suppression hearing. At the suppression hearing, Fulmer testified that the defendant did not come to a

full stop at the stop sign. (Mot. Tr. at 39.) At trial, although Fulmer stated that the defendant stopped before making the U-turn, he qualified that statement by explaining that he refers to a "rolling stop" as a stop, but that the defendant did not come to a full stop. (Trial Tr. 10/21/04 a.m. at 117.) Fulmer never testified at either the trial or the suppression hearing that the defendant came to a complete stop at the stop sign. This inconsistency was only a minor one. *See Valentine,* 401 F.3d at 612; *Fryer,* 974 F.2d at 818-19; *cf. Rouse,* 359 F.2d at 1015 (finding multiple inconsistencies between the two police officers' testimonies at the suppression hearing, as well as between the suppression hearing and trial).

* * * * *

.....Thus, no reconsideration of the motion to suppress is warranted.

C. Government's use of acquitted conduct

Finally, the defendant seeks reversal of the denial of the defendant's motion in limine regarding the defendant's acquitted conduct. (Def.'s Am. Mot. at 14.) The defendant appears to be arguing that although the court admitted as being intrinsic to the crimes charged here evidence of the murder of which defendant was acquitted, its admission "substantially prejudice[d] the defendant in the eyes of the jury." (*Id.*) The defendant also claims that the government is now trying to justify admission of this evidence under Federal Rule of Evidence 404(b)[5],

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[5] Text of footnote omitted.

which would have required giving the jury a cautionary instruction about the limited role that this evidence should play.[6] (Def.'s Am. Supplemental Argument at 1-2.) Although it is unclear from his post-trial briefs, it seems that the defendant is also arguing that no evidence indicates that the alleged conspiracy and the murder were related.[7] (Def.'s Am. Mot. at 2.)

Where the government offers evidence of an incident that is part of the conspiracy alleged in the indictment, it is not an "other crime" which would be subject to Rule 404(b) and require a cautionary jury instruction. *United States v. Badru,* 97 F.3d 1471,

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[6] The defendant's argument that the government has "changed its position" is unpersuasive. (Def.'s Am. Supplemental Argument at 2.) The government's opposition does not reflect a change in position. The government argues that the murder evidence "was direct evidence of allegations contained in the indictment," where "Rule 404(b) does not apply." (Gov.'s Combined Opp'n at 11.) Although the government later states that proof of motive, intent, identity, plan and absence of mistake "are [also] completely proper under Rule 404(b)" (*id.*), this is not an indication that the government is now justifying the admission of this evidence through Rule 404(b). Instead, the government is merely articulating that if an act is part of the crime charged, "evidence of it will, by definition, always satisfy Rule 404(b)." *United States v. Alexander,* 331 F.3d 116, 126 n. 13 (D.C.Cir.2003); *see also United States v. Bowie,* 232 F.3d 923, 927 (D.C.Cir.2000).

[7] The defendant avers that "at no time during the murder trial of Jack Davis did the government indicate that Jack Davis shot David Scott because he robbed Jack or James Davis of his drug money.... Nor was it ever indicated during the murder trial that Jack and James Davis were drug dealers ... or in a conspiracy to sell drugs." (*Id.* at 2.)

1474 (D.C.Cir.1996); *United States v. Gray*, 292 F.Supp.2d 71, 79 (D.D.C.2003). Rather, "[t]he evidence is offered as direct evidence of the fact in issue, not as circumstantial evidence requiring an inference as to the character of the accused." *Badru*, 97 F.3d at 1475 (citing 23 Wright & Graham, *Fed. Practice and Procedure* § 5329 at 450 (1978)). Evidence is intrinsic to the crime charged in the indictment if "it is an uncharged offense which arose out of the same transaction or series of transactions as the charged offense [or] if it was inextricably intertwined with the evidence regarding the charged offense." *Id.* at 1474 (quoting *United States v. Weeks*, 716 F.2d 830, 832 (11th Cir.1983)).

Here, witnesses testified that the defendant shot and killed Head in 1996 because Head robbed the defendant's brother, a co-conspirator. Count One of the indictment in this case alleged that the defendant committed acts of violence and murder in furtherance of the 1993 to 2003 narcotics conspiracy charged and in retaliation for violence committed against members of the conspiracy. As such, the defendant's alleged murder of Head was part of the crime charged and was fairly subject to proof. This intrinsic evidence was not governed by Rule 404(b) and its probative value was not substantially outweighed by the danger of unfair prejudice. The ruling on the motion in limine will not be reversed, and the defendant's motion for a judgment of acquittal will be denied.

* * * * *

CONCLUSION AND ORDER

The evidence, viewed in the light most favorable to the government, permitted a reasonable jury to find the essential elements of a conspiracy to distribute PCP, and the government was not required to establish that the charged conspiracy existed during the exact dates mentioned in the indictment. There was no significant inconsistency in the FBI agents' testimony with regard to the defendant's traffic stop which would warrant a reversal of the court's denial of the defendant's pre-trial motion to suppress. The government properly introduced the defendant's acquitted conduct as evidence of conduct intrinsic to the conspiracy. No willful or negligent Jencks violation warranting post-trial relief has been shown. The parties may not inquire into the jurors' deliberative process, and the defendant has not shown good cause or a reasonable basis for inquiring about possible extraneous influences on the jury's deliberations. Therefore, it is hereby

ORDERED that the defendant's motion for judgment of acquittal, for a new trial, and for a court order permitting the defendant to interview jurors [# 243] be, and hereby is, DENIED. It is further

* * * * *

Signed this 22nd day of November, 2005.

s/
Richard W. Roberts
United States District Judge

United States District Court
For the District of Columbia

United States of America,

v.

Criminal No. 03-348

Jack Davis

Washington, DC
March 18, 2004
9:30 a.m.

Transcript of Motions Hearing
Before the Honorable Richard W. Roberts
United States District Judge

Order of Court:
Tr. 166:20 – 168:6

* * * * *

Mr. Davis alleges that the agents who were pursuing him had no proper authority for making the traffic stop, and therefore, without a warrant, could not have stopped him, seized him or searched him and that the fruits of that search and seizure should be suppressed.

Now, a traffic stop such as this one would have to be justified by probable cause or at least reasonable suspicion of some unlawful conduct based on specific and articulable facts, as the Supreme Court has said in the Whren Case, W-H-R-E-N, decided in 1996. The decision to stop an automobile

is reasonable where the police have probable cause to believe that a traffic violation has occurred, even if the violation is a minor one. And the Court has to analyze the objective circumstances that are surrounding the case there.

The testimony of the agent was that the defendant driving the Navigator at the intersection of Wayne and Second Street rolled through the stop sign; did not come to a complete stop; veered to the right without any signal, left-turn signal on, and began to turn back to the left to execute a U-turn and that the U-turn was executed in such a way that he, the driver of the Navigator, nearly collided with the agents' car as it was proceeding through that intersection.

The defense testimony and evidence was principally through Mr. Buckhanan. Mr. Buckhanan testified that the Navigator came to a full stop at that corner, and therefore, there was no failure to stop at a stop sign violation and that the U-turn that the defendant allegedly was attempting to execute was somehow short of a fully-executed U-turn; had not fully matured into a U-turn and that the agents had rushed into the intersection to try to cut off the Navigator.

* * * * *

TR. 173:17-23

The direct conflict between whether the Navigator did stop or did not stop, I resolve in favor of crediting the testimony of Agent Fulmer, who was directly behind the Navigator and was in a far better

position to observe whether the vehicle did come to a full stop than was Mr. Buckhanan by his testimony, having been halfway down the block.

* * * * *

TR. 174:8 – 175:1

In any event, I credit the testimony of the Agent that this Navigator failed to come to a full stop and that it rolled through the stop sign as opposed to the testimony of Mr. Buckhanan that the Navigator did come to a full stop.

Having found that there was a violation, at least of the requirement that a vehicle come to a full stop at a stop sign, the officers then did have a basis, a proper basis for stopping the driver of the vehicle for them having observed a violation of the traffic laws of the District of Columbia

And, of course, at that point, with a lawful basis to stop the defendant in driving his car, the officers, of course, have a basis for approaching the car and getting the – asking for identification from the driver and asking him to get out of the car, which the Agent's testimony showed they tried to do.

* * * * *

TR. 176:22-24

The motion, then, by defendant Jack Davis to suppress the physical evidence seized during the course of the traffic stop is denied.

United States Court of Appeals
For the District of Columbia Circuit

No. 06-3046 **September Term, 2006**

03cr00348-01
Filed On:
[Date Stamp
August 3, 2007]

United States of America,
Appellee

v.

Jack Davis, a/k/a Twin,
Appellant

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

No. 06-3046 **September Term, 2006**

03cr00348-01

United States of America,
Appellee

Filed On:
[Date Stamp
August 3, 2007]

v.

Jack Davis, a/k/a Twin,
Appellant

BEFORE: Sentelle, Tatel, and Brown, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing filed June 25, 2007, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Michael C. McGrail
Deputy Clerk

United States District Court
For the District of Columbia

United States of America,

v.

Criminal No. 03-348

Jack Davis

Washington, DC
March 18, 2004
9:30 a.m.

Transcript of Motions Hearing
Before the Honorable Richard W. Roberts
United States District Judge

Testimony of Special Agent Kyle Fulmer:
Tr. 38:15 – 39:4

Q: Okay; now, what happened after he turned onto Wayne and approached the intersection of Second Street?

A: Like I said, at that point, we were right behind him. It was obvious that he knew we were back there. And we just decided we were going to break off the surveillance because he knew we were there, and at that point, we got to the stop sign. He rolled through the stop sign and began to turn to the right, what it appeared, onto, I guess that would be Second Street right there, and we were going to just continue straight, and it was at that time that, once I began to move, he turned back and made a U-turn

in front of us to the point where we almost had a fender bender with him.

Testimony of Jason Buckhanan:
TR. 126:25 – 127:7

Q: Where were you when you called him?

A: I was right across the street from 206, right on Wayne Street.

Q: Okay; and I see you're motioning with the pen on that photograph. If you could, just mark where you were. Were you in a car, or were you on foot?

A: I was in my car, yes.

TR. 127:16-21

Q: Did you see him after that phone call?

A: Yes, when he pulled past me.

Q: Okay, now, when you say he pulled past you, in what direction was he traveling?

A: Traveling, I guess, this way, towards Second.

TR. 129:6-23

Q: So did you get out of your car?

A: No, I waited till he passed me. Then, I got out as I saw the car behind him pass him; it looked like a

little black Chevrolet or something, I forgot what it was, but after I – after they passed me, I walked over towards the apartment.

Q: You walked over towards what?

A: Towards the apartment on the sidewalk. As I started walking down, I see the truck put on its brake lights, stop at the stop sign. Went to make the U-turn; as I'm walking down, they just rushed him.

Q: When you say they rushed him, who rushed who?

A: The two people in the black car; the two white men in the black car. They didn't even wait till he got, you know, no U-turn or nothing; they just cut him off.

United States District Court
For the District of Columbia

United States of America,

v.

Criminal No. 03-348

Jack Davis

Washington, DC
October 21, 2004
9:15 a.m.

Transcript of Trial – AM Session
Before the Honorable Richard W. Roberts
United States District Judge
and a jury

Testimony of Special Agent Kyle Fulmer:
Cross-Examination
Tr. 114:22 – 117:24

A: * * * * *

By that time there is very little traffic in that area, and we were very close, you know, a few hundred feet behind him, and then he came to a stop at Second and Wayne Place, and we pulled up behind him at that point. We were going to break it off – we were going to break off the surveillance at that point.

Q: You were going to break it off, but what happened?

A: Well, at that point he was stopped at the sign for a little bit, and then he made a U-turn at the intersection, and began to come back towards us, and at that point we just decided to stop him.

* * * * *

Q: So it is your recollection, you just testified, that Mr. Davis came to the stop sign, correct?

A: Correct.

Q: And stopped his vehicle, correct?

A: Correct.

Q; And then he began to make a U-turn, correct?

A: Right.

Q: Do you recall testifying back on March 18, 2004, with regard to that same incident?

A: I recall testifying previously, yes.

Q: And do you recall being asked that same question with regard to Mr. Davis having come to a full stop at that stop sign and responding, no, he did not?

A: I am just saying he stopped at the stop sign. You know, I was basically trying to give you a recreation of what took place.

Q: Right. But you understand my question, right?

A: Yes, I understand.

Q: And your testimony today is that he did come to a complete stop, correct?

A: Well, he slowed and basically stopped at the sign.

Q: Well, basically stopped means he stopped, correct?

A: Well, I roll through stop signs myself. I call that stopping. But did I stop, sometimes I don't. But I refer to it as stopping. On that date did he completely stop? No, he didn't. But he wasn't stopped because he rolled through the stop sign, he was stopped because he made the U-turn in front of us.

Q: You understand what stop means, right?

A: I understand what stop means.

Q: You are a law enforcement officer, correct?

A: Yes.

Q: So when I asked you that question, did he come to a complete stop, complete stop didn't mean, roll through, did it?

A: No.

Q: And when you answered, yes, he did come to a complete stop, yes means yes, correct?

A: Yes means yes.

* * * * *

Q; But as you sit here today, now it is your recollection that he did not come to a complete stop?

A: No. That is not correct. He did not come to a complete stop. He rolled through it, but I refer to that as a stop, just like I would normally do sometimes myself.

Re-Direct Examination
Tr. 135:18 – 136:13

Q: All right, Agent Fulmer, I just have two or three real simple questions for you.

What was the basis of your stopping Jack Davis on December 17, 2001? Why were you able – why did you stop him? For doing what?

A: Illegal U-turn in the intersection.

* * * * *

Q; Now did the fact that he may have rolled through a stop sign have anything to do with Jack Davis being stopped?

A: No.

Q: Did you ever tell anybody, or write down anywhere, or testify in front of a Judge that the reason that you stopped Jack Davis had anything to

do with whether or not he stopped or didn't stop at that stop sign?

A: No.

United States District Court
For the District of Columbia

United States of America,

v.

Jack Davis

Filed On:
[Date Stamp
November 1, 2004]

Criminal No. 03-348

Note from Jury

Do we need to determine wether [sic] it was a legal stop on Dec 17, 2001, or has it already been reviewed by the court and determine [sic] it was legal.

Dear Jurors,

Thank you for your note.

You do not need to determine whether it was a legal stop on December 17, 2001. That has already been reviewed and determined by the Court.

s/
Judge Roberts

Date: 10/26/04

Time: 11:30

s/
Foreperson

United States District Court
For the District of Columbia

United States of America,

Filed On:
[Date Stamp
November 1, 2004]

v.

Criminal No. 03-348

Jack Davis

Note from Jury

The instructions to the jury state that "what you must do is determine whether the conspiracy charged in the indictment existed" (p. 24) Does this mean the jury must conclude that the "Ways Manner and Means to Accomplish Conspiracy" must be exactly as described in the indictment. Specifically, must the jury conclude beyond a reasonable doubt that it was part of the conspiracy that co-conspirators "knowingly and intentionally perpetrated acts of violence, including murder." (Paragraph 9, Page 4 of the Indictment.)

Dear Jurors:

The answer to both questions is "no".

s/
Judge Roberts

Date: 10/27/04

Time: 10:00

s/
Foreperson